

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OPELTON KELLY,

Petitioner,

v.

DAVID L. BERGH,

Respondent.

CASE NO. 2:06-CV-13259
JUDGE ARTHUR J. TARNOW
MAGISTRATE JUDGE PAUL J. KOMIVES

MEMORANDUM ORDER DENYING PETITIONER'S MOTION FOR EVIDENTIARY
HEARING (docket #7)

Petitioner Opelton Kelly filed a petition for the writ of habeas corpus in this Court on July 31, 2007, challenging his state court conviction for first degree murder. On January 14, 2008, petitioner filed this motion for an evidentiary hearing pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, respectively. As explained more fully in my Report and Recommendation filed on this date, petitioner's claims are barred by the statute of limitations. Petitioner's application and the record of state court proceedings filed by respondent pursuant to Rule 5 establishes that petitioner is not entitled to the writ of habeas corpus because the claims are time-barred. Nothing in the evidence sought by petitioner would affect the Court's resolution of the limitations issue. Accordingly, an evidentiary hearing is not appropriate. *See* Rule 8(a), 28 U.S.C. foll. § 2254 (evidentiary hearing required only where facts necessary to determination are outside the record); *cf. Levine v. Torvik*, 986 F.2d 1506, 1517-18 (6th Cir. 1993) (suggesting that Rule 7 is not appropriate to include evidence in the record which has no

relevance to the issues before the court).

In view of the foregoing, it is ORDERED that petitioner's Motion for an Evidentiary Hearing are both hereby DENIED. The attention of the parties is drawn to FED. R. CIV. P. 72(a), which provides a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

IT IS SO ORDERED.

s/Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 8/28/08

The undersigned certifies that a copy of the foregoing order was served on the attorneys of record by electronic means or U.S. Mail on August 28, 2008.

s/Eddrey Butts
Case Manager